MOHD SALLEH HJ YUSOFF

v.

ABDUL RAHMAN HJ YAACOB

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: D-02-585-00]
4 FEBRUARY 2005

CIVIL PROCEDURE: *Consent order - Leave to issue execution against defendant - Whether defendant given right of hearing - Rules of the High Court 1980, O. 38 r. 2(3)*

CIVIL PROCEDURE: *Summons-in-chambers - Evidence by affidavit - Whether cross-examination of deponent necessary - Rules of the High Court 1980, O. 38 r. 2(3)*

CIVIL PROCEDURE: *Affidavits - Evidence by affidavit - Whether cross-examination of deponent necessary in summons-in-chambers' application - Rules of the High Court 1980, O. 38 r. 2(3)*

CIVIL PROCEDURE: *Striking out - Oral application by way of preliminary objection - Whether application improper*

A consent order entered between the appellant and the respondent required the respondent to pay a sum of RM3,350 to the appellant within a certain time frame, failing which, the respondent's right to a certain piece of land would be forfeited. The respondent allegedly attempted to make the said payment within the time frame but was rebuffed by the appellant. The respondent then applied by way of summons-in-chambers ('SIC') for leave to issue execution against the appellant on the consent order. The SIC was adjourned several times. In the interim period the respondent applied to have the original trial heard *de novo* and the consent order set aside. However that application was dismissed. When the SIC came up for hearing, the appellant made an oral application to strike it out for want of prosecution on the grounds of inordinate delay, laches and for taking a fresh step in the proceedings whilst the SIC was still pending. That did not find favour with the learned judge who dismissed the oral application

and allowed the SIC. Hence, this appeal by the appellant. The appellant made the same oral application to strike out the SIC. Further, the appellant complained that the learned judge deprived him of his right of hearing. This was because he was not cross-examined on his affidavit in opposition unlike the deponent of the affidavit in support of the application.

Held (dismissing the appeal)
Per Arifin Zakaria JCA delivering the judgment of the court:

[1] The oral application by the appellant ought to have been made by way of summons-in-chambers supported by affidavit. It could not be properly made by way of a preliminary objection supported by statements of counsel from the Bar. There was also no material before the learned judge in support of the said application. Therefore, the learned judge had properly exercised his discretion in rejecting the oral application. (p 789 a-c)

[2] The right to cross-examine the deponent of an affidavit is governed by O. 38 r. 2(3) of the Rules of the High Court 1980 ('RHC') which provides, *inter alia*, that the court may on the application of any party order the attendance for cross-examination of the deponent of an affidavit. When such an order has been made and the person in question does not attend court, his affidavit shall not be used as evidence without the leave of the court. (p 789 g)

[3] There was no application by the respondent's counsel to cross-examine the appellant. Nor was there any application for the appellant to give evidence on oath. The learned judge did not think it necessary to call the appellant to the stand. Thus, the learned judge was perfectly entitled to make his finding based on the evidence before him. Having done so, he held that the respondent had on a balance of probabilities made out a case against the appellant. There was no procedural impropriety in that. (pp 789 h & 790 a)

[4] The learned judge was entitled to come to his finding that the respondent did go to the appellant's house to make the necessary payment pursuant to the consent order and that the appellant rebuffed the payment. This was a finding of fact and since the learned judge had heard and seen the witnesses, he would be in a better position to assess their credibility. It was not open to this court at the appellate court to interfere with such a finding. (p 791 e-f)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perintah persetujuan yang dimasuki oleh perayu dan responden menetapkan bahawa responden perlu membayar sejumlah RM3,350 kepada perayu dalam tempoh masa tertentu, dan akan kehilangan hak-haknya terhadap sebidang tanah jika gagal berbuat demikian. Responden cuba membuat bayaran dalam tempoh yang ditetapkan tetapi telah ditolak oleh perayu. Responden kemudian memohon kebenaran melalui saman dalam kamar ('SDK') untuk menguatkuasakan perintah persetujuan terhadap perayu. SDK telah ditangguh beberapa kali. Sementara itu, responden memohon untuk mengenepikan perintah persetujuan dan supaya perbicaraan asal didengar *de novo*. Apabila SDK mula didengar, perayu membuat permohonan lisan untuk membatalkan SDK atas alasan ketiadaan pendakwaan berpunca dari kelewatan yang melampau, kelengahan dan kerana pengambilan langkah baru dalam prosiding ketika SDK masih belum diputuskan. Permohonan bagaimanapun tidak diperkenan oleh yang arif hakim, sekaligus menolak permohonan lisan untuk membatal dan membenarkan SDK. Perayu dengan itu merayu. Di rayuan, perayu sekali lagi mohon membatalkan SDK. Selain itu, perayu mengadu bahawa yang arif hakim tidak memberinya peluang untuk didengar. Ini kerana, tidak seperti pengikrar afidavit menyokong permohonan, beliau tidak diperiksa balas berkaitan afidavit menentangnya.

Diputuskan (menolak rayuan)
Oleh Arifin Zakaria HMR menyampaikan penghakiman mahkamah:

[1] Permohonan lisan perayu seharusnya dibuat melalui saman dalam kamar dan disokong oleh afidavit. Ia tidak boleh dibuat melalui bantahan awal dan disokong oleh kenyataan peguam dari meja peguam. Juga tidak terdapat apa-apa material di hadapan hakim bicara bagi menyokong permohonan perayu. Oleh itu, yang arif hakim telah melaksanakan budi bicaranya dengan betul apabila menolak permohonan lisan.

[2] Hak untuk memeriksa balas pengikrar afidavit adalah dikawal oleh A. 38 k. 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 yang memperuntukkan, antara lain, bahawa mahkamah boleh, atas permohonan mana-mana pihak, memerintahkan kehadiran pengikrar afidavit untuk pemeriksaan balas. Apabila perintah sedemikian dibuat dan pengikrar berkenaan tidak hadir, afidavitnya itu tidak boleh diguna sebagai keterangan tanpa kebenaran mahkamah.

[3] Tiada permohonan dibuat oleh peguamcara responden untuk memeriksa balas perayu. Juga tiada permohonan oleh perayu untuk memberi keterangan secara bersumpah. Yang arif hakim tidak fikir ianya perlu untuk memanggil perayu ke kandang saksi. Yang arif hakim, dengan itu, berhak untuk membuat rumusannya berdasarkan keterangan yang ada dihadapannya. Setelah berbuat demikian, beliau memutuskan bahawa responden, atas imbangan kebarangkalian, telah membuktikan kesnya terhadap perayu. Tiada apa-apa kesilapan prosedural berlaku di sini.

[4] Yang arif hakim berhak untuk membuat rumusan bahawa responden sememangnya telah pergi ke rumah perayu untuk membuat bayaran berkenaan mengikut perintah persetujuan dan bahawa perayu telah menolaknya. Ini adalah dapatan fakta dan oleh kerana yang arif hakim telah mendengar dan melihat sendiri saksi-saksi beliau tentunya berada dalam posisi yang lebih baik untuk menilai kredibiliti mereka. Adalah tidak terbuka bagi mahkamah ini, di peringkat rayuan, untuk campur tangan dalam dapatannya itu.

Case(s) referred to:
Chong Sooi Chuen v. Yuen Lai Chan [1988] 2 MLJ 443 ***(refd)***
Choo Tiong Hin & Ors v. Choo Hock Swee [1959] MLJ 67 ***(refd)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(foll)***
DB Brace, ex p The Debtor v. H Gabriel & Anor [1966] 1 WLR 595 ***(refd)***
Luh Din Chong v. Ngu Een Ngouk [1966] 1 MLJ 1129 ***(refd)***
Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia & Ors [1996] 2 CLJ 923 HC ***(foll)***
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 38 r. 2(3)

For the appellant - Foo Say Ghee; M/s Foo Say Ghee & Zamzuri
For the respondent - Zainal Abidin Mustaffa; M/s Zainal & Mariani

Reported by Usha Thiagarajah

JUDGMENT

Arifin Zakaria JCA:

Background Facts

By writ of summons dated 26 January 1969 the plaintiff/respondent commenced this action against the defendant/appellant, seeking, *inter alia*, an order that the transfer to the appellant of land, Lot No: 2550, Mukim Padang Embong, Daerah Kubang Sepat, Pasir Mas, held under N.E.M.R. 207 ("the said land"), be declared null and void and that the register be rectified accordingly and the plaintiff be declared as the proprietor of the said land. The suit was settled and a consent order was entered before Abdul Razak J on 6 January 1976 wherein it was ordered that:

(1) the plaintiff shall pay the defendant the sum of $3,350 inclusive of costs within the period of one month from the date thereof;

(2) the defendant shall execute a valid and registerable transfer of the said land to the plaintiff upon receipt of the said sum of $3,350;

(3) in default on the part of the plaintiff to pay defendant the said sum of RM$3,350 within the said time the plaintiff shall forfeit his right to the said land.

The respondent did not pay the said sum within the stipulated time. However, he alleged that he did attempt to make the said payment within the stipulated time but was rebuffed by the appellant.

By summons in chambers ("SIC") dated 29 May 1976 the respondent made the present application seeking leave of court to issue execution against the appellant of the order dated 6 January 1976.

The application was, for some reasons, adjourned on a number of occasions, and it was not until 1 August 2000, the SIC was finally heard and disposed of by Suriyadi J. He made an order in terms of the respondent's application. The appellant is dissatisfied with the decision of the learned judge and hence this appeal.

Preliminary Objections

At the hearing before Suriyadi J the learned counsel for the appellant made an oral application to strike out the respondent's application for want of prosecution on the ground of inordinate delay, laches, and for taking a fresh step whilst this application was still pending. This did not find favour with the learned judge. However, no reason was given in rejecting the

appellant's application. The same application was again made to this court. Having considered the matter, we are of the view that procedurally the application ought to have been made by way of summons in chambers to be supported by affidavit. (See *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia (sued as a firm) & Ors*. [1996] 2 CLJ 923; *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 493.) Relying on the above authorities, clearly the application could not properly be made by way of a preliminary objection supported by statements of counsel from the Bar. In the circumstances, we hold that the application was not properly before the learned judge and further there was no material before him in support of the application. For those reasons we hold that the learned judge had properly exercised his discretion in rejecting the application. As we see it, this is nothing more than just an attempt by the appellant to short cut or truncate the entire proceedings. For the above reasons, the said application by the appellant is dismissed.

The Merits

Principally the complaint by the appellant is that the learned judge, after hearing the oral testimonies of the respondent's witnesses, ought to have given the appellant the same opportunity. By failing to do so it is contended that the appellant had been deprived of his right of hearing. In considering this issue it should be borne in mind that this is an application by SIC. The respondent filed affidavits in support of the application, and the appellant filed his affidavit in opposition. When the matter came up for hearing before Suriyadi J the deponent of the affidavits supporting the application were called for cross-examination, except for the respondent, who had since passed away. The appellant, though still alive at the material time, was not called for either examination-in-chief or cross-examination. In the record of appeal the learned judge noted thus: "Defendant not required to be called as nobody made that application. No necessity. I will depend on affidavits to ascertain and decide."

The right to cross-examine the deponent of an affidavit is governed by O. 38 r. 2(3) of RHC which provides, *inter alia*, that the court may, on the application of any party, order the attendance for cross-examination of the deponent of an affidavit and when, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the court. In the present case no application was made by the respondent's counsel to cross-examine the appellant, nor was there any application for the appellant to give evidence on oath. The learned judge did not think it necessary to call the appellant to the stand.

Thus, in the circumstances the learned judge is perfectly entitled to make his finding based on the evidence before him. Having done so, he held that the respondent had, on balance of probability, made out a case against the appellant. We do not see any procedural impropriety in that. In support, we would refer to the case of *D.B. Brace, Ex-Parte The Debtor v. H. Gabriel and Anor* [1966] 1 WLR 595. Briefly the facts of the case taken from the head note are as follows:

> A petitioning creditor presented a petition based on the debtor's failure to comply with a bankruptcy notice. The petitioning creditor's solicitors' articled clerk swore a formal affidavit of service of the petition on the debtor. After a receiving order was made on the petition, the debtor applied, pursuant to section 108(1) of the Bankruptcy Act 1914, to rescind it on the ground that he had not been served with the petition. He swore an affidavit in support of his application deposing that he had not been served with the petition; he also filed a like affidavit by the secretary of a company of which he was managing director. Both the debtor and his supporting deponent were present on the hearing of the application for rescission of the receiving order and were tendered for cross-examination.
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> The registrar indicated, having read the affidavits, that he would like to hear evidence of the service of the petition, and, accordingly, the petitioning creditor's solicitors' articled clerk gave oral evidence of the service of the petition; he was subjected to a searching cross-examination by counsel for the debtor, at the end of which the registrar said that he was satisfied as to the service of the petition and dismissed the application.
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> The debtor appealed on the ground that the registrar was not entitled to form a view without hearing the cross-examination on his and his deponent's affidavits.

His appeal was dismissed by the Court of Appeal, Sellers LJ in dismissing the appeal at p. 597 stated thus:

> It is said before this court that there was some misconduct in those proceedings, based on the remarkable contention that there was no cross-examination on the two affidavits which the debtor had put in. There was no occasion for any cross-examination. Oral evidence was given by the one witness whom the court desired to be cross-examined on his affidavit, on oath, and that was convincing evidence which overbore the evidence on oath of the other two deponents, the debtor and his other witness. I can see no ground whatever for saying that that matter was not perfectly conducted. There was no request on behalf of the debtor that he or his witness should give evidence on oath. All that is said is that the witnesses were there and

> were offered for cross-examination. I can see no occasion for any cross-examination at all. The affidavits on their face were not very convincing, they were equivocal; and the evidence of Lowe had been convincing. That was the simple issue for the registrar, and he decided against the debtor.

In the present case the learned judge held that the circumstances warrant the court to exercise its discretion in favour of the respondent. He gave his reasons, which read as follows:

> How could I not have been convinced of the plaintiff's case when PW2, the wife of the late plaintiff in clear terms testified that she personally went to the defendant's house with her late husband, to make the alleged payment but was rebuffed. The defendant instead told her husband to make the necessary payment at his office. Likewise the same thing happened there. She took a "beca" (a form of public transport) to reach the house, ridden by one Zali bin Berahim. The latter (PW4), confirmed all the salient facts, even to the extent of knowing the purpose of the visit to the defendant's house. He also saw the money brought by the plaintiff. PW3 also testified that she loaned RM1,000 to the late plaintiff for purpose of the impugned payment. If I may add, there is nothing available before me to show that the witnesses were not credible, had been coached or their evidence had been tainted by some reason or other.

In short he said, after considering the affidavits filed by both parties and after hearing the oral testimonies of PW2, PW3 and PW4 he is convinced that PW2, PW3 and PW4 were witnesses of truth. He then came to his finding that the respondent did go to the appellant's house to make the necessary payment pursuant to the court's order and the appellant rebuffed the payment. In the circumstances, we are of the view the learned judge was entitled to come to that finding. This is a finding of fact and since the learned judge had heard and seen the witnesses he would be in a better position to assess their credibilities, and, it is not open to us at the appellate level to interfere with the said finding. This is in line with the established principle laid down in a long line of authorities that, the appellate court is always slow to interfere with the finding of facts made by the trial judge as he had the advantage of hearing and seeing the witnesses and, would therefore, be in a better position to assess their credibilities. (See *Choo Tiong Hin & Ors. v. Choo Hock Swee* [1959] MLJ 67; *Luh Din Chong v. Ngu Een Ngouk* [1966] 1 MLJ 1129; *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49; *Chong Sooi Chuen v. Yuen Lai Chan* [1988] 2 MLJ 443).

For the above reasons we hold that there is no merit in this appeal and the appeal is accordingly dismissed with costs to the respondent, and the deposit to be paid to respondent towards account of taxed costs.